

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY L. GRIMES
Claimant

VS.

GARLAND RURAL VOLUNTEER FIRE DEPT.
Respondent

AND

COMMERCIAL UNION INS. CO.
Insurance Carrier

Docket No. 261,793

ORDER

Respondent requested review of the October 27, 2005 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on February 7, 2006.

APPEARANCES

Kala A. Spigarelli, of Pittsburg, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that timely written claim is no longer disputed, and that if this claim is found compensable, claimant is permanently and totally disabled under K.S.A. 44-510c(a)(2). The parties further agreed that if found compensable, this claim should be remanded to the ALJ for a determination on the issue of claimant's wage in light of the provisions of K.S.A. 44-511(b)(6)(A), as that statute existed on July 2, 2000, claimant's date of accident. The parties also agreed that the ALJ's rulings with respect to the claimant's past medical bills are not in dispute and the Board therefore adopts and affirms the ALJ's findings on that issue. Finally, respondent announced that it is abandoning its defense based upon claimant's alleged failure to use a safety device as provided by K.S.A. 44-501(d)(1).

ISSUES

The primary issue in this case is whether claimant's on-the-job heart attack and his resulting permanent total disability is barred by the provisions of K.S.A. 44-501(e)(hereinafter "heart amendment"). The ALJ concluded that while claimant was not involved in any unusual exertion while fighting the grass fire on July 2, 2000,¹ the "smoke and heat were substantial external forces in the claimant's work environment, and that such forces were substantial causative factors in the claimant's heart attack."²

The respondent requests review of the ALJ's decision alleging a variety of errors. First, respondent contends the heart amendment bars claimant's claim. While respondent agrees with the ALJ's conclusion that claimant was not exerting any unusual effort in fighting the fire, respondent nonetheless contends the ALJ erred in finding external factors, specifically smoke inhalation, contributed to claimant's heart attack.

Claimant argues that the ALJ's Award should be affirmed in all respects.

The only issue to be decided in this appeal is whether claimant's claim is barred by the provisions of the heart amendment. If his claim is found compensable, the parties have agreed the claim should be remanded to the ALJ for further evidence on the issue of average weekly wage in light of the provisions of K.S.A. 44-511(b)(6)(A).³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In 1995 claimant suffered from chest pain and based upon a referral by his family physician, he was seen by Dr. Francis Corcoran, an internist. Dr. Corcoran performed some tests and diagnosed arteriosclerotic coronary artery disease which was causing blockage in 2 of claimant's arteries, both on the left side. Dr. Corcoran referred claimant for surgery, and claimant underwent a quadruple bypass on the left side. Following the

¹ Claimant concedes he is not asserting that unusual exertion was involved in this case. Rather, claimant argues the heat and smoke constitute an external force which removes this claim from the application of the heart amendment.

² ALJ Award (Oct. 27, 2005) at 4.

³ Contrary to the terms of the applicable statute, the ALJ presumed a full-time wage and imputed that to claimant for purposes of determining wage. Other than evidence as to a full-time firefighter's wage, there was no evidence as to the average number of hours a volunteer firefighter worked. Given the lack of evidence, the parties agreed that the issue of wage should be developed with additional proceedings before the ALJ.

procedure, claimant was doing well. Claimant was allowed to return to his normal work duties including his volunteer firefighting activities. He had regular checkups with Dr. Corcoran and appeared to have no lasting problems. Claimant had a complete checkup in March 2000 that was insignificant other than an abnormality in the "ST-T waves", a finding that had been present since bypass surgery.⁴

On July 2, 2000, at approximately 7:30 p.m., claimant and his wife, Betty, both received a call to go fight a grass fire one-half mile from their home. Claimant and his wife left their home and drove to the site of the fire. Claimant parked his vehicle on the side of the road and walked to the ditch with a shovel. According to his wife, the area was hot, humid and smoky from the fire. It had been in the 90's that day, but there is no evidence as to the temperature at the time of this fire. According to Mrs. Grimes, the two had fought fires when it was hotter than on this day and they were doing nothing other than their normal firefighting duties.

Mrs. Grimes was beating the fire with her shovel when she heard a loud noise. She turned around and saw her husband falling to the ground in an area that had been burned. She went to his aid and found him unconscious and shaking. His clothes were covered in ash and soot, and the side of his face appeared burned. By this time, two other firemen showed up and she called out to them for help. Medical assistance was also called and although they responded and intubated claimant at the scene, it is clear that claimant was deprived of oxygen for approximately 15 minutes. In addition to cardiac arrest claimant suffered from hypoxic brain damage.

Claimant was taken to the hospital, via helicopter, and after stabilization, a coronary arteriography was performed which revealed a 95 percent blockage on the right coronary artery, a vessel that had not been bypassed, nor was it blocked back in 1995. Surgery was performed and a stint was implanted. Claimant was in a coma for a period of time. When he emerged from the coma he was transferred to another hospital for rehabilitation. He has since returned home and his condition has been stable, at least from a cardiac standpoint.

According to Mrs. Grimes, her husband can no longer be left alone. He is able to walk with help and at times is incontinent. He also has anger issues, something that was not a problem before this event. According to Dr. Allen, claimant's family physician, claimant is not going to improve. He can no longer drive, is unemployable and is able to do only limited household duties. Mrs. Grimes has hired someone to stay with her husband during the day while she works.

There is no dispute that claimant sustained a heart attack while fighting this fire. The ultimate question is, for purposes of K.S.A. 44-501(e), whether there were external

⁴ Corcoran Depo. at 25.

forces that were a substantial causative factor of the heart attack thus rendering the heart amendment inapplicable.

K.S.A. 44-501(e), known as the heart amendment provides:

(e) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The goal of this statute is "not to deny compensation to claimants who suffer injury on the job, but rather to avoid requiring the employer to act as an absolute insurer of claimants whose death or disability was merely the result of the natural progress of disease and which coincidentally occurred at the workplace."⁵ The courts have interpreted this statute to allow compensation when the resulting heart attack results from a work-related external force.⁶

"To support a finding that [a] claimant's cardiac or vascular injury is the product of some external force, [1] the presence of a substantial external force in the working environment must be established and [2] there must be expert testimony that the external force was a *substantial causative factor* in producing the injury and resulting disability."⁷

As noted by the ALJ, "[a]s long as a work related external force contributed in a substantive way to the heart injury and resulting disability, the injury is compensable."⁸ He explained -

It stands to reason that the claimant would have inhaled some smoke, and become more oxygen deprived, working next to an open fire than if he had been working in fresh air. The court is persuaded that smoke and heat were substantial external forces in the claimant's work environment, and that such forces were substantial causative factors in the claimant's heart attack.⁹

Thus, the ALJ found this claim to be compensable and unaffected by the heart amendment.

⁵ *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 199-200, 62 P.3d 236 (2003).

⁶ See *Dial v. C.V. Dome Co.*, 213 Kan. 262, 515 P.2d 1046 (1973).

⁷ *Mudd*, 275 Kan. 187, 194; see also *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

⁸ ALJ Award (Oct. 27, 2005) at 3.

⁹ *Id.* at 4.

The paramedic, John Lowery, who responded to the call and who treated claimant at the scene testified that when intubating claimant at the scene he noticed soot and swelling inside claimant's mouth. According to him, swelling can result from a lack of oxygen.¹⁰

Dr. Corcoran, the internist who treated claimant both before this event and after, testified claimant certainly had pre-existing heart disease. He further testified that based upon Mr. Lowery's testimony, he believed that claimant had indeed suffered smoke inhalation at the fire, resulting in a decrease of oxygen in the blood. He explained his opinion as follows:

A. Okay. Well, first of all, we found out subsequently that he did have a significant blockage in one of the coronary - the coronary artery that had not been bypassed and so Mr. Grimes was obviously putting out a fair amount of energy fighting a grass fire on a hot July day, which is strenuous physical activity requiring a significant workload on the heart to circulate blood for all this activity. And he's getting air with a diminished amount of oxygen, probably, and irritating his lungs with the smoke. So he's probably got decreased levels of oxygen circulation to begin with. And then he's got an artery that can't deliver good blood flow to one side of the heart because of a high-grade blockage that was there, which hadn't really caused any symptoms yet. And so he was getting a definite imbalance in the blood flow to the back wall of the heart as opposed to the front wall because of that blockage. And when you set up that kind of an imbalance it makes the heart prone to become irritable and have irregular rhythms. And all it takes is one extra beat, one premature beat at the right time in the cardiac cycle, and that will set off ventricular fibrillation. And at that point circulation ceases.¹¹

He goes on to state that "the whole set of circumstances, the heat, the strenuous physical activity and the probable smoke inhalation, all added - you know, they're all additive, one on top of the other. And given the substrate of a partially blocked artery that you can trigger this kind of rhythm disturbance."¹²

Dr. Corcoran conceded he did not look in claimant's mouth to confirm the presence of soot, and that he is relying upon the paramedic's recollection. Nonetheless, he maintains to a medical degree of certainty that claimant inhaled smoke and that this element contributed to the scenario that led to his heart attack.

In contrast to Dr. Corcoran's testimony is that of Dr. P. Brent Koprivica, the physician retained by respondent to review the claimant's records and opine as to the cause of

¹⁰ Lowery Depo. at 11.

¹¹ Corcoran Depo. at 15-16.

¹² *Id.* at 17.

claimant's heart attack. Dr. Koprivica is board certified in emergency medicine, but is primarily a medical/legal practitioner who routinely performs medical examinations for purposes of litigation. He testified that although there is some evidence that soot was observed in claimant's oral pharynx, there is no evidence that claimant's carboxy hemoglobin level was drawn. Such presence of soot does not, standing alone, establish smoke inhalation.¹³ But because this test was not done, Dr. Koprivica felt there was no reason to believe that the smoke caused by the fire could be a contributor to claimant's ultimate heart attack with the information presently available. While smoke could be the cause of claimant's cardiac event, he felt he could not say, to a medical degree of certainty, that was the case.¹⁴

Dr. Koprivica admits he never physically examined the claimant and that he did not review the testimony of Mr. Lowery, the paramedic, or Dr. Corcoran or Dr. Allen. He did, however, state that smoke inhalation can cause cardiac arrest.¹⁵ But he was uncertain, based upon the evidence presented to him, that claimant suffered from smoke inhalation and that the smoke inhalation caused his heart attack.

The Board has reviewed the evidence offered by the parties and finds that the ALJ's conclusion on the issue of external force should be affirmed. Although claimant had suffered from significant cardiac problems in the mid-1990's, he had recovered and apparently had no lasting effects. His regular checkups were unremarkable and up to the day of the fire, he had expressed no physical complaints relative to his heart. When he responded to this fire, he was exposed to smoke, heat and humidity. Given the (as of then unknown) extent of the blockage in his heart (95%), it is not surprising that his heart succumbed to the external stress and the compromised oxygen flow. The Board agrees with the ALJ's analysis and affirms the finding that the heat and smoke were substantial external forces, thus rendering claimant's accident compensable and exempt from the heart amendment.

In light of this finding and consistent with the parties stipulation, this matter is remanded to the ALJ for further proceedings on the sole issue of claimant's wage. At that point, his Award can be calculated based upon his agreed-upon status as permanently and totally disabled.

¹³ Koprivica Depo. at 8-9.

¹⁴ *Id.* at 20-21.

¹⁵ *Id.* at 21.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 27, 2005, is affirmed in part, reversed in part and remanded for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director